77-88

No.

In the Supreme Court of the United States

OCTOBER TERM, 1977

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

CESAR GAUTIER TORRES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

JURISDICTIONAL STATEMENT

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OPINION BELOW

The opinion of the district court (App. A, *infra*, pp. 1a-18a) is reported at 426 F. Supp. 1106.

JURISDICTION

The judgment of the district court was entered on February 16, 1977 (App. B, *infra*, p. 19a). Notice of appeal to this Court was filed on March 16, 1977 (App. C, *infra*, p. 20a). On May 6, 1977, Mr.

Justice Brennan extended the time for docketing the appeal to and including June 14, 1977; and on June 14, 1977, Mr. Justice Brennan further extended the time to and including July 14, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1252. *Weinberger* v. *Salfi*, 422 U.S. 749, 763 n. 8.

QUESTION PRESENTED

Whether Sections 1611(f) and 1614(e) of the Social Security Act, which exclude residents of Puerto Rico from eligibility for benefits under the program of Supplemental Security Income for the Aged, Blind, and Disabled, deny due process to individuals who upon moving to Puerto Rico lose the benefits to which they were entitled while residing in the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV, Section 3, of the Constitution provides in pertinent part:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *.

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

Section 1611(f) of the Social Security Act, as added, 86 Stat. 1468, 42 U.S.C. (Supp. V) 1382(f), provides:

> Notwithstanding any other provision of this title, no individual shall be considered an eligible individual for [Supplemental Security Income benefits] * * * any month during all of which such individual is outside the United States (and no person shall be considered the eligible spouse of an individual for purposes of this title with respect to any month during all of which such person is outside the United States). For purposes of the preceding sentence, after an individual has been outside the United States for any period of 30 consecutive days, he shall be treated as remaining outside the United States until he has been in the United States for a period of 30 consecutive days.

Section 1614(e) of the Social Security Act, as added, 86 Stat. 1473, 42 U.S.C. (Supp. V) 1382c(e), provides:

> For purposes of this title, the term "United States," when used in a geographical sense, means the 50 States and the District of Columbia.

STATEMENT

1. The program of Supplemental Security Income for the Aged, Blind, and Disabled, as added, 86 Stat. 1465, and amended, 42 U.S.C. (Supp. V) 1381 *et seq.*, was enacted to replace several pre-existing cooperative federal-state programs for such individuals with a single, uniform system of welfare benefits administered by the Secretary of Health, Education, and Wel-

fare. The new program guarantees a monthly income to persons who meet federally prescribed income levels and other eligibility criteria.[1]

Section 1611(f) of the Social Security Act, 42 U.S.C. (Supp. V) 1382(f), provides that persons residing outside the United States are ineligible for SSI benefits. Section 1614(e) of the Act, 42 U.S.C. (Supp. V) 1382c(e), defines the term "United States" to include only the fifty States and the District of Columbia. Residents of the Commonwealth of Puerto Rico and the territories of Guam, American Samoa, and the Virgin Islands continue to be eligible for benefits under the pre-existing programs of Old Age Assistance, 49 Stat. 620, as amended, 42 U.S.C. 301 *et seq.*, Aid to the Blind, 49 Stat. 645, as amended, 42 U.S.C. 1201 *et seq.*, Aid to the Disabled, as added, 64 Stat. 555, and amended, 42 U.S.C. 1351 *et seq.*, and Aid to the Aged, Blind, and Disabled, 42 U.S.C. 1381 *et seq.* These programs are designed, as is the SSI program, to assist the aged, blind, and totally disabled to meet their expenses for food, clothing, shelter, and other essential items of daily living. In contrast to the SSI program, however, under these programs the territories rather than the Secretary determine (subject only to broad federal guidelines)

[1] The maximum income that an individual may receive and still be eligible for SSI benefits is $2,133.60 per year, which also is the maximum benefit payable to an individual. 42 Fed. Reg. 24210. These figures are subject to cost of living adjustments. See 42 U.S.C. (Supp. V) 1382f.

the level of benefits to which eligible individuals are entitled.[2]

2. Appellee became eligible for SSI disability benefits while he resided in Hartford, Connecticut. He received payments of $157.70 for the months of September through November 1975. On November 7, 1975, appellee moved to San Juan, Puerto Rico, whereupon the Social Security Administration advised him that he was no longer eligible for SSI benefits. Appellee then instituted this suit in the United States District Court for the District of Puerto Rico, claiming that the exclusion of Puerto Rico from the SSI program unconstitutionally discriminates against Puerto Rican residents and violates his constitutional right to travel (App. A, *infra*, pp. 2a-3a).[3]

A single-judge district court temporarily enjoined the Secretary from discontinuing appellee's benefits, and a three-judge court was convened pursuant to

[2] The programs are implemented by a territory's "plan" subject to the Secretary's approval (see 42 U.S.C. (1970 ed.) 1382; 45 C.F.R. 201.3) and are funded pursuant to a cost-sharing formula under which the federal government pays a portion of the benefits provided by the participating territory (see 42 U.S.C. 302). Under Puerto Rico's plan, the maximum income that an individual may receive and still be eligible for assistance is $456 per year ($516 for the aged). The benefits payable under that plan equal 40 percent of the difference between the maximum allowable income and the individual's actual income.

[3] After appellee filed his complaint, the Secretary sent him a "Notice of Planned Action" informing him that his SSI benefits would be terminated effective December 1, 1975, and advising him of his appeal rights. Appellee then filed a "Request for Reconsideration of the Notice of Planned Action,"

28 U.S.C. 2284(3). A majority of that court ruled that Sections 1611(f) and 1614(e) are unconstitutional as applied to a citizen who moves to Puerto Rico after having received SSI benefits while residing in one of the fifty States or the District of Columbia. The court reasoned that such persons are denied their right to travel by the challenged provisions, that the denial is not supported by any compelling governmental interest, and that Sections 1611(f) and 1614(e) therefore are unconstitutional as applied to appellee.[4]

THE QUESTION IS SUBSTANTIAL

The decision of the district court denies, at least in significant part, Congress' historic power to distinguish between the residents of the United States[5] and those of Puerto Rico and other noncontiguous jurisdictions administered under the Territory Clause of Article IV, Section 3, of the Constitution. See *Downes* v. *Bidwell*, 182 U.S. 244. The practical effect

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which was denied on February 20, 1976. The Secretary stipulated that that denial constituted final agency action, and the district court therefore had jurisdiction over appellee's complaint. See *Mathews* v. *Diaz*, 426 U.S. 67, 73.

[4] Subsequent to the decision of the district court in this case, two other new residents of Puerto Rico brought suit in the United States District Court for the District of Puerto Rico, raising claims identical to appellee's. Relying on the decision in the instant case, a single-judge district court granted judgment in their favor. *Colon* v. *United States*, No. 76-1434, decided March 29, 1977. The Solicitor General has authorized an appeal from the decision in that case as well.

[5] We use the term "United States" as defined by Section 1614(e) of the Social Security Act.

of this decision, unless reversed, may be to require Congress to extend all federal social welfare programs to residents of Puerto Rico; the estimated cost of so extending the SSI program alone would exceed $300 million per year (see note 7, *infra*).

1. Article IV, Section 3, Clause 2, confers upon Congress power to "make all needful Rules and Regulations respecting the Territory * * * belonging to the United States." Puerto Rico's attainment of Commonwealth status in 1952, conferring upon it "a relationship to the United States that has no parallel in our history" (*Examining Board of Engineers* v. *Flores de Otero*, 426 U.S. 572, 596), did not abrogate Congress' power to legislate with respect to Puerto Rico under that Clause. See Leibowitz, *The Applicability of Federal Law to the Commonwealth of Puerto Rico*, 56 Geo. L. Rev. 219, 224-225 (1967). Congress' broad power over dependencies (see *Hornbuckle* v. *Toombs*, 18 Wall. 648, 655; *National Bank* v. *County of Yankton*, 101 U.S. 129, 133; *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 314) allows it to establish classifications that distinguish between residents of the United States and those of noncontiguous jurisdictions administered under the Territory Clause. Accordingly, Congress has inherent power to create a social welfare program for the residents of the United States that does not extend to residents of Puerto Rico. See *Downes* v. *Bidwell*, *supra* (holding that duties, imposts, and excises need not be uniform as between Puerto Rico and the States). See also *Balzac* v. *Porto Rico*, 258 U.S. 298; *Dorr* v. *United States*, 195 U.S. 138.

The exclusion of Puerto Rican residents from the SSI program was not, however, merely arbitrary. It was rationally based in the significant economic differences between Puerto Rico and the United States. The standard of living in Puerto Rico is significantly lower than that of the United States,[6] and the extension to it of the SSI program—which provides maximum benefits that are not substantially lower than the average income in Puerto Rico—would in effect provide a significant disincentive to gainful employment and threaten further to disrupt Puerto Rico's already ailing economy.[7] In these circumstances, Congress reasonably determined not to extend the SSI program to Puerto Rico but rather to

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[6] In part in recognition of this fact, Congress has exempted residents of Puerto Rico from federal income taxes (48 U.S.C. 734) and Puerto Rican employers from minimum wage requirements in certain industries (29 U.S.C. 206).

[7] Per capita income of residents in the United States in 1969 was $3,139; for residents of Puerto Rico it was $981. *1970 Census of Population*, "Characteristics of the Population," vol. I pt. 1, p. 398, pt. 53, p. 207 (1973). Unofficial figures from the Bureau of Economic Analysis, Department of Commerce, show that in 1975 these figures had increased, respectively, to $5,834 and $2,328. In 1975 the maximum benefits payable under the SSI program amounted to $1,892.40 (40 Fed. Reg. 22289). The current maximum benefit level is $2,133.60 (note 1, *supra*). The Division of Supplemental Security Studies of the Department of Health, Education, and Welfare estimates that, if the SSI program were extended to Puerto Rico, approximately one out of every ten residents would be eligible for benefits, at a cost of over $300 million per year.

leave in effect there the pre-existing welfare programs that the SSI program otherwise replaced.[8]

2. In so legislating, Congress was not required to distinguish between those residents of Puerto Rico who have lived in the United States and those who have not. In particular, Congress was not compelled to exclude from participation in the SSI program only those residents of Puerto Rico who, unlike appellee, did not move or return to Puerto Rico after a period of residence in the United States.

In holding otherwise, the district court reasoned that appellee's right to travel was infringed by the unavailability of SSI benefits in Puerto Rico. It is true that the exclusion of Puerto Rico from the SSI program may have the incidental effect of deterring

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[8] "[I]n view of the different economic and other circumstances in the territories and possessions, the Congress felt it would be inadvisable to provide the Federal SSI income guarantee level in the territories and possessions" and therefore "[f]or these jurisdictions, Congress continued the then existing program of aid and services for the aged, blind, and disabled." Statement of Senator Long, Chairman of the Senate Finance Committee, in connection with a bill proposing the extension of the SSI program to the Northern Mariana Islands. 122 Cong. Rec. S3279-S3280 (daily ed., March 11, 1976). The legislative history of the SSI program itself also indicates that Congress wished to avoid creating large-scale welfare dependencies within Puerto Rico. See Hearings on H.R. 1 (Social Security Amendments of 1971) before the Senate Committee on Finance, 92d Cong., 1st Sess. 95 (1971).

There is now pending in the Congress a bill that would extend the SSI program to Puerto Rico, Guam, and the Virgin Islands. See H.R. Rep. No. 95-394, 95th Cong., 1st Sess. 46-47 (1977). A similar proposal was defeated at the time the program was originally enacted. See App. A, *infra*, pp. 11a-14a.

some persons from taking up residence there, and of encouraging others already there to leave. But that two-edged impact on the choice of residence does not offend the Constitution.

The doctrine of a constitutional right to travel imposes two principal limitations on legislative power. First, it limits the extent to which a state may discriminate against new residents. See *Shapiro* v. *Thompson*, 394 U.S. 618; *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250. Cf. *Edwards* v. *California*, 314 U.S. 160. In this case, however, there is no discrimination against new residents; indeed, appellee's complaint is that, as a new resident of Puerto Rico, he is treated in the same manner as an old resident.

Second, the doctrine places upon the federal government the burden of justifying a ban on foreign travel. *Zemel* v. *Rusk*, 381 U.S. 1. *Cf. Kent* v. *Dulles*, 357 U.S. 117. But in this case there is no ban or formal restriction on travel. The statutory scheme challenged by appellee does not regulate travel as such. It simply establishes a federal social welfare program for residents of the United States that does not extend to residents of Puerto Rico, other dependencies, or other nations.[9] Although this scheme may encourage some United States citizens to change their residences, and discourage others from doing so, its net impact on

[9] Although the district court was concerned only with travel to Puerto Rico, the logic of its rationale would appear to apply even if appellee had moved to a foreign nation. But cf. *Flemming* v. *Nestor*, 363 U.S. 603.

travel appears to be neutral and its constitutionality must be assessed without reference to any ancillary effect it may have on a particular individual's choice of residence.[10] Since, as we have shown (pp. 6-8, *supra*), the distinction drawn by Congress between residents of the United States and, *inter alia*, residents of Puerto Rico was valid, the district court erred in reversing the Secretary's denial of benefits to appellee.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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JULY 1977.

[10] Similarly, that one state provides higher welfare benefits than another may affect migration between those states, but the constitutional right to travel does not require uniformity in state welfare or other policies.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil Number: 75-1331

CESAR GAUTIER TORRES on behalf of himself and all others similarly situated, PLAINTIFF

v.

DAVID MATTHEWS, Secretary of Health, Education and Welfare, DEFENDANT

OPINION

Torruella, J.

Title XVI of the Social Security Act (SSA), 42 USC 1381 et seq., also known as the Supplemental Security Income (SSI) program,[1] establishes "a national program to provide supplemental security income to individuals who . . . are . . . disabled." 42 USC 1381. Pursuant to Section 1611(f) of the SSA, 42 USC 1382(f), no individual is eligible for these benefits during any month in which "such individual is outside the United States." Furthermore, the statute provides that once "an individual has been outside the United States for any period of 30 consecutive days, he shall be treated as remaining outside the United States until he has been in the United States for a period of 30 consecutive days." The term "disabled" is defined, in part, as one who "is a

[1] Public Law 92-603, October 30, 1972, 86 Stat. 1465.

resident of the United States." 42 USC 1382c(a)(1)(B). In turn, Section 1614(e) of the SSA, 42 USC 1382c(e), defines " 'United States', when used in a geographical sense" as indicated above, as meaning the 50 States and the District of Columbia.

Plaintiff, a citizen of the United States, was found to be eligible to receive SSI benefits, due to disability, while residing in Hartford, Connecticut. During the months of September through November, 1975 he received monthly payments in the amount of $157.70.

On November 7, 1975, Plaintiff moved to San Juan, Puerto Rico. Shortly after his arrival there he visited the Social Security offices to inform this Agency of his change of address, in order to enable him to continue receiving his SSI checks. While there, Plaintiff was verbally notified by an employee of this Agency that he had rendered himself ineligible to receive further SSI benefits by reason of his change of residence to Puerto Rico. Plaintiff was instructed to immediately turn over to the Social Security Administration any SSI benefits received while he resided in Puerto Rico.

Without further ado, Plaintiff proceeded to file the present action in which he seeks to have the residency requirement set aside as contravening the due process clause of the Fifth Amendment of the Constitution of the United States. On November 26, 1975, pursuant to 28 USC 2284(3), and after a specific finding of irreparable injury to Plaintiff, the District Court issued a temporary restraining order against Defendant prohibiting the discontinuance of Plaintiff's SSI

benefits until such time as the questions raised by this suit as decided by the Three Judge District Court convened for these purposes.

On December 19, 1975 the Social Security Administration sent Plaintiff a "Notice of Planned Action" wherein he was informed that his SSI benefits would be suspended effective December 1, 1975. This Notice also advised Plaintiff of his appeal rights. In compliance with the Court's outstanding temporary restraining order, the Notice stated that Plaintiff would continue to receive his SSI benefits while the order remained in effect.

On January 19, 1976 Plaintiff proceeded to file with the Administration a "Request for Reconsideration of the Notice of Planned Action." On February 20, 1976 this Request was denied. As grounds for this action, it was stated: "Although you meet all other factors of eligibility, you do not meet the residence requirements. To be eligible for Supplemental Security Income checks, you must live in one of the 50 States or Washington, D.C."

After several preliminary procedural interchanges the Administration has affirmed its decision as final for purposes of 42 USC 405(g), thus concluding that no further exhaustion of administrative remedies is necessary. See *Mathews* v. *Eldridge*, 424 U.S. 319 (1976); *Weinberger* v. *Salfi*, 422 U.S. 749 (1975); 20 CFR 416.1424c.

Plaintiff contends that the exclusion from SSI benefits of a citizen of the United States for the sole reason of his change in residence to Puerto Rico, is re-

pugnant to the Fifth Amendment of the Constitution of the United States in that it establishes an irrational and arbitrary classification violative of the equal protection component of the due process clause of said Constitutional provision. As alternative grounds Plaintiff further contends that the statute in question infringes upon his constitutional right to travel and freedom of movement in that it forces him, in order to qualify for these benefits (which to him are essential), to remain within the 50 States and the District of Columbia.

Defendant replies that this legislation constitutes a valid exercise by Congress of its plenary powers pursuant to the territorial clause of Article IV, Section 3 of the Constitution, and that no arbitrary classification is created by the Statute in question. Relying upon the so-called *Insular Cases*,[2] Defendant claims that "[t]he equal protection component of the due process clause of the Fifth Amendment of the Constitution does not require Congress to afford the Commonwealth of Puerto Rico the same treatment under the scope of its enactments as though it were a state."

This last contention is the starting point for the resolution of the questions raised by this case.

The *Insular Cases*, which were the product of acquisition by the United States of various non-contiguous territories after the termination of the Spanish-American War, resolved the issue of whether the Constitution "follows the flag." After much debate,[3] the Court in *Balzac* v. *Porto Rico*, 258 U.S. 298 (1922), created [4] the doctrine of incorporated versus

[2] *De Lima* v. *Bidwell*, 182 U.S. 1 (1901); *Dooley* v. *United States*, 182 U.S. 222 (1901); *Downes* v. *Bidwell*, 182 U.S. 244 (1901); *Dorr* v. *United States*, 195 U.S. 138 (1904); *Balzac* v. *Porto Rico*, 258 U.S. 298 (1922).

[3] For some contemporary legal thinking, see Baldwin, *The Constitutional Questions Incident to the Acquisition Government by the United States of Island Territory*, 12 Harv. L. Rev. 393 (1899); Lowell, *The Status of Our New Possessions —A Third View*, 13 Harv. L. Rev. 155 (1899); Palfrey, *The Growth of the Idea of Annexation, and Its Breaking Upon Constitutional*, 13 Harv. L. Rev. 371 (1899); Randolf, *Constitutional Aspects of Annexation*, 12 Harv. L. Rev. 291 (1899); Longdell, *The Status of Our New Territories*, 12 Harv. L. Rev. 364 (1899). A later article also contains some interesting views on this subject, Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 26 Col.L.Rev. 823 (1926).

[4] This process was recently described as follows in *Examining Board* v. *Flores de Otero*, —— U.S. —— (1976), decided June 17, 1976, at footnote 30 of page 26 of the slip opinion:

> "The division of opinion in the Congress over how, and to what extent, the Constitution applied to Puerto Rico was reflected in the Court's opinions in *Downes*. Mr. Justice Brown believed that the question was whether Congress had extended the Constitution to Puerto Rico; Mr. Justice White, with whom Justices, McKenna and Shiras joined, propounded the theory of incorporated and unincorporated territories, and Mr. Justice Gray was of the opinion that the question was essentially a political one to be left to the political branches of government. The Chief Justice, with whom Justices Harlan, Brewer, and Peckham joined, dissented on the ground that the Constitution applied to Puerto Rico *ex propio vigore*. Mr. Justice White's approach in *Downes* v. *Bidwell* was eventually adopted by a unanimous Court in *Balzac* v. *Porto Rico*."

[Footnote continued on page 6a]

unincorporated territories whereby in the later case (that is, territories for which Congress had not expressed an intention of eventual Statehood) only "certain fundamental personal rights declared in the Constitution" were held to be in effect within its geographical confines. (258 U.S. at pages 312-313). In *Balzac*, a criminal slander prosecution for published "reflections" on the then Governor of Puerto Rico, the Court held that Puerto Rico was an unincorporated Territory. Therefore, the Court concluded, there did not exist a Sixth Amendment right to trial by jury, because such a trial was not a "fundamental" right.[5]

[4] [Continued]

For a more jocular description of this process see "Mr. Dooley at His Best" (1938), F. Dunne, also reported in a note entitled *Inventive Statesmanship* v. *The Territorial Clause: The Constitutionality of Agreements Limiting Territorial Powers*, 60 Va. L. Rev. 1041, 1063 (1974).

[5] Interestingly enough the Supreme Court has since then held that the right to trial by jury is "*fundamental* to the American scheme of justice." *Duncan* v. *Louisiana*, 391 U.S. 145, 149 (1967) (emphasis supplied); *Baldwin* v. *New York*, 399 U.S. 66 (1969). Furthermore, it is unlikely that the offense for which Balzac was sentenced to five months imprisonment would be held to be a triable offense under current Supreme Court reasoning. Cf. *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1954); *Garrison* v. *Louisiana*, 379 U.S. 64 (1964). *Ashton* v. *Kentucky*, 389 U.S. 195 (1966).

Since the *Insular Cases*, the Supreme Court has significantly advanced the equality of rights for other cognizable minority citizens of the United States, by striking down similar judge-made distinctions bearing on the rights of such citizens (Cf. *Plessy* v. *Ferguson*, 163 U.S. 537 (1896) and *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

[Footnote continued on page 7a]

Defendant's reliance on the *Insular Cases*, however, is the product of a misconception as to the issues before us. We are not here concerned with the alleged power of Congress to establish disparate treat-

[5] [Continued]

Expectations for the imminent demise of the *Insular Cases* were raised by the decisions in *Reid* v. *Covert*, 354 U.S. 1 (1956), *Kinsella* v. *Singleton*, 361 U.S. 234 (1960), *Grisham* v. *Hagan*, 361 U.S. 278 (1960), and *McElroy* v. *Guagliardo*, 361 U.S. 281 (1960), all dealing, in different variations, with the application of the Constitution to civilians who accompany directly upon the *Insular Cases* the Court said in *Reid* v. *Covert, supra*:

> "This Court and other federal courts have held or asserted that various constitutional limitations apply to the Government when it acts outside the continental United States. While it has been suggested that only those constitutional rights which are 'fundamental' protect Americans abroad, we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of "Thou shalt nots' which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments . . ." (354 U.S. at pages 8-9).

The Court went on to say:

> "The 'Insular Cases' can be distinguished from the present cases in that they involved the power of Congress to provide rules and regulations to govern *temporarily* territories with wholly dissimilar traditions and institutions whereas here the basis for governmental power is American citizenship. Moreover, it is our judgment that *neither the cases nor their reasoning should be given any further expansion.* The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the

[Footnote continued on page 8a]

ment towards the United States citizens who reside in Puerto Rico. Rather, the focus of our attention should be directed to determining whether a constitutional right of a citizen of the United States has been improperly penalized *while he is within one of these States.* We see this as the more relevant framing of the issues because although Plaintiff lost his benefits while physically in Puerto Rico, the statutory prohibitions that permitted this result came into play from the very moment when they exerted their force upon Plaintiff. From this standpoint, Plaintiff is in the same position now as if he would have remained in Connecticut and brought a declaratory judgment suit there to challenge the validity of the sections at issue, in compliance with the requirements of the Declaratory Judgment Act, 28 U.S.C., Sections 2201, 2202. See *Public Service Commission of Utah* v. *Wycoff Co.*, 344 U.S. 237, 242-244 (1952); *Golden* v. *Zwickler*, 394 U.S. 103, 108-11 (1969).

It is now beyond question that the right to travel and to freedom of movement, particularly within the United States, are fundamental rights of all citizens

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[5] [Continued]

benefit of a written Constitution and undermine the basis of our Government. . . ." (354 U.S. at page 14; emphasis supplied).

Unfortunately, there are recent indications that the Court has not yet seen fit to lay the cadaver of the *Insular Cases* to rest. The aforecited case of *Examining Board* v. *Flores de Otero, supra,* may very well have given new warmth to this otherwise moribund corpse. (See pages 25-28 of the slip opinion).

of the United States, *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 254 (1974); *Shapiro* v. *Thompson*, 394 U.S. 618, 629-633, 641-642 (1969).

In *United States* v. *Guest*, 383 U.S. 745, 757-758 (1966), the Court said:

> "The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.
>
> ". . . [T]he right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event freedom to travel throughout the United States has long been recognized as a basic right under the Constitution."

See also *Kent* v. *Dulles*, 357 U.S. 116, 125-127 (1957). Cf. *Flemming* v. *Nestor*, 363 U.S. 603 (1960).

Shapiro v. *Thompson*, supra, is particularly relevant. That case involved constitutional challenges to statutory provisions of Connecticut, Pennsylvania and the District of Columbia which required one year's residence as a prerequisite to welfare eligibility. Appellants' principal contentions were to the effect that the waiting period was needed to preserve the fiscal integrity of public assistance program and as a permissible attempt to discourage indigents from entering a State solely to obtain larger benefits. The Court stated, at 394 U.S. page 634:

> ". . . [I]n moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest is unconstitutional."

Pursuant to the Equal Protection Clause of the Fourteenth Amendment, the Court struck down the state statutes as failing to meet this standard. The Court further decided:

> "The waiting-period requirement in the District of Columbia Code . . . is also unconstitutional even though it was adopted by Congress as an exercise of federal power. In terms of federal power, the discrimination created by the one-year requirement violates the Due Process Clause of the Fifth Amendment. '[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" '. . . For the reasons we have stated in invalidating the Pennsylvania and Connecticut provisions, the District of Columbia provisions is also invalid—the Due Process Clause of the Fifth Amendment prohibits Congress from denying public assistance to poor persons otherwise eligible solely on the ground that they have not been residents of the District of Columbia for one year at the time their application are filed." (394 U.S. at pages 641-642).

Considering the fundamental nature of the right to travel, we can perceive of no reason why the stand-

ards which restrictive legislation must meet are not applicable with equal vigor to any impingement upon travel *from*, as distinguished from travel to, a State. *Kent* v. *Dulles*, supra. Cf. *Zemel* v. *Rusk*, 381 U.S. 1 (1965). Furthermore, if we view these principles in the light of the application to Plaintiff of the sections of the Statute in question, it is validly apparent that such provisions have restricting, inhibiting, chilling and penalizing effects upon Plaintiff's exercise of a fundamental constitutional right, and can survive our scrutiny only if there is a compelling governmental interest that will justify such treatment. *Memorial Hospital* v. *Maricopa County*, supra, at pages 253-262; *Shapiro* v. *Thompson*, supra, at page 631; *Cole* v. *Housing Authority of City of Newport*, 435 F.2d 807 (C.A. 1, 1970).

Our search for a "compelling governmental interest" within the Medusa-like legislative history of Public Law No. 92-603 resembles the proverbial quest for the needle in the haystack. See 1972 U.S. Code Congressional and Administrative News, Vol. 3, pp. 4989-5400.

As originally envisioned in H.R. 1, one of the principal purposes of the SSI provisions was the establishment of "uniform treatment of recipients under the Federal State public assistance program" (id., p. 4989), to thus have "nationally uniform requirements for such eligibility factors as the level and type of resources allowed." Id. p. 4992. In consonance with this goal H.R. 1, included Puerto Rico (as well as Guam and the Virgin Islands) with-

in the SSI program. Id. pp. 5013, 5324, 5350.[6] However, the benefits for these jurisdiction were "adjusted by the ratio of the per capita income of each of these locales, to the per capita income of the lowest of the 50 States." Id., pp. 5022, 5320, 5349-5350.

There were misgivings expressed to H.R. 1 by several Congressmen. In a document entitled "Additional Views of Hon. Hugh L. Carey, Hon. Charles A. Vanik, Hon. William J. Green, and Hon. James C. Corman on H.R. 1." (Id., pp. 5362-5367), the following statements were made:

> "We are concerned with the provisions which would permit states to reinstitute residence requirements of up to one year. Population stability is assured by equal opportunity for employment and for those in need by a national welfare system paying adequate benefits, rather than through the establishment of interstate barriers to the mobility of the poor in exactly the way which the Supreme Court prohibited in *Shapiro* v. *Thompson*, (394 U.S. 618).
>
> . . .
>
> We recognize that the Committee action moves in the direction of more equitable treatment of the Commonwealth of Puerto Rico and other insular areas. This is evidenced by the change in benefit level for a family of four from $636 to $1,320. This figure, however, is considerably below the federal minimum standard of $2,400. We

[6] Section 2014(e) of H.R. 1 specifically included Puerto Rico within the definition of the term "United States." Id., p. 5324.

recognize that this is an involved and complicated question. We recognize that the relationship between income level in Puerto Rico and state public assistance benefits presents a problem and that this problem has been negotiated by the Administration AND THE Commonwealth government and those in the Department of Health, Education and Welfare.

The problem remains that as long as States such as New York, Pennsylvania, Massachusetts, Ohio, etc. have a more attractive level of benefits, there is an incentive to migrate to those areas from the Commonwealth and other insular areas at a time when unemployment is a problem both in the area of origin and in the area of destination. With this in mind, the Department, which is undertaking the administration of the program in insular areas and in the States, should be prepared to accept a new responsibility. The Department should initiate such positive programs as are required to improve opportunities for employment through training and bring about a better system of benefits through work programs than has been in effect heretofore.

It is not our intent to state that any such program be designed to impede or deter citizens from moving freely in search of employment. Rather, we want to make sure that a decision would be made on the grounds of self-improvement; not due to pure economic differential in welfare.

We are pleased the Secretary has agreed, therefore to implement these programs which would benefit the citizens of Puerto Rico and other

> insular areas as well as all the other citizens of the United States found to be eligible and in need." (Emphasis supplied).

For reasons that are to our viewpoint, unclear, the Senate completely eliminated Puerto Rico from SSI coverage, thus relegating it to treatment under the then existing Federal-State programs. 42 U.S.C. 301, 1201, 1351.

In its brief the Government asserts "[t]he cost factor and the effect of the extension of SSI benefits to Puerto Rico" as the rational basis for Congressional action. It does not discuss the issue of compelling state interest separately and we thus assume that it considers its assertions as to rational basis and compelling state interest to be closely akin. We take the substance of the Government's argument to mean that if SSI benefits were to apply to residents of Puerto Rico to the same extent as to those of the 50 States and the District of Columbia, that the total cost of the program would be higher, and that the benefits paid to Puerto Rican residents, when compared to the local per capita income, could have a deleterious effect upon the character of Puerto Rican welfare recipients.[7]

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[7] In its brief, the Government quotes the following statements made before the Senate Committee on Finance on H.R. 1 (in hearing held July 27, 29, August 2, 3, 1971, page 95), as "principal evidence of Congressional intent in removing coverage for Puerto Rico from this provision":

> "In fact, a comment from a very high official from Puerto Rico early this year was that 'we do not want any

[Footnote continued on page 15a]

Even accepting these statements at face value, we fail to see how those factors have any connection with the facts presented by this case. Here we have a United States citizen who resides in one of the States and starts receiving SSI benefits while there. His qualifying for the receipt of these benefits while in Connecticut, and his continued receipt of the same, can have no bearing on any added cost that may be incurred by giving these benefits to the residents of Puerto Rico, which is not at issue here. Similarly, there can be no logical connection between such a situation and the import upon Puerto Rican welfare recipients. Although it can be argued that the higher Stateside benefits would encourage migration for the purpose of qualifying for SSI, not only is there an absence of proof that the reasoning behind the geographic limitations is to discourage such internal migration, but if such were *sub silentio* the rationale, it would be a clearly impermissible compelling state interest. *Memorial Hospital* v. *Maricopa County*, supra, at pages 263-264; *Shapiro* v. *Thompson*, supra, at pages 631, 641-642.

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[7] [Continued]

> part of this, because if you put 33.7 percent of the people in Puerto Rico in category of being eligible for welfare, it will ruin the character of our people."

If this be evidence of Congressional intent, it is weak evidence indeed, particularly when, as is recognized by the Government in its brief, and as is readily apparent from the quoted statement itself, the statement is inapplicable to SSI but rather deals with H.R. 1 in general. The granting of increased benefits to the blind, incapacitated, and those aged over 65 in Puerto Rico can hardly place 33.7% of the Puerto Rican population in a position of claiming SSI benefits.

The above leads us to the forceful conclusion that, under the facts of this case, there is a lack of such compelling state interest as to justify penalizing Plaintiff's right to travel. We therefore conclude that Section 1611(f) and Section 1614(e) of the SSA are unconstitutional as applied to Plaintiff.

In reaching this result we are not unaware of the possibility that, if the Social Security Act remains in its present form, we may be opening the door to certain undesirable practices. This is inevitable when dealing with this type of legislation, and of course, we can not presume that such actions will be those of the large majority of citizens. In any event, such contingencies are the proper subject of corrective legislative and regulatory endeavor and should not be determinative of the issues here presented.

The Clerk shall enter Judgment in accordance with this Opinion.

In San Juan, Puerto Rico, this 14th day of February, 1977.

/s/ Jose V. Toledo
JOSE V. TOLEDO
Chief, District Judge

/s/ Juan R. Torruella
JUAN R. TORRUELLA
District Judge

MCENTEE, *Senior Circuit Judge* (dissenting). While I have great respect for the scholarly nature of the majority's opinion and while I am sympathetic to the policy considerations which it reflects, I am unable to agree with the majority as to the significance of the legal principles at issue. Accordingly, I must dissent.

In my view, what is basically at issue here is the Congressional decision that SSI benefits are to be unavailable to anyone not located in one of the fifty states or the District of Columbia. 42 U.S.C. § 1381 *et seq.* This I consider to be the real issue, rather than a citizen's right to travel.

Given the unique relationship between the Commonwealth of Puerto Rico and the United States, *see Examining Board* v. *Flores de Otero*, —— U.S. —— (June 17, 1976); *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 42 (1970),[1] I do not believe that Congress is *required* to extend any one particular financial benefit to those located in the Commonwealth.[2] While I

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[1] *See also* 48 U.S.C. § 731, *et seq.*; *Caribtow Corp.* v. *OSHRC*, 493 F.2d 1064 (1st Cir. 1974) and cases cited. *See generally* de Passalacqua, The Constitutional and Political Status of the Island of Puerto Rico, 10 Rev. de Derecho Puertorriqueno 11 (1970); Leibowitz, the Applicability of Federal Law to the Commonwealth of Puerto Rico, 56 Geo. L. J. 219 (1967); Magruder, The Commonwealth Status of Puerto Rico, 15 U. Pitt. L. Rev. 1 (1953).

[2] Nor in fact has Congress done so historically. *See* Leibowitz, *supra* note 1, at 269-70.

It should be noted that the unicity of Puerto Rico's relationship to the United States does not always work to the Island's disadvantage. In the tax area, for example, Puerto

might well have voted to extend SSI benefits to Puerto Rico had I been a member of the legislative branch, as a judge I am unable to perceive any mandate—constitutional or otherwise—that this must be done.

As for the majority's argument based on the right to travel, I would simply state that I have found no case which extends the rationale of *Shapiro* v. *Thompson*, 394 U.S. 618 (1969)[3] to travel other than between two or more of the fifty States or the District of Columbia. And I do not believe that the present status of the complex relationship between Puerto Rico and the United States constitutes an adequate predicate for a judicial extension of that rationale to the instant case.

I recognize that this case raises very important issues, and I am deeply impressed by the cogency with which the majority articulates its position. Nevertheless, for the reasons stated, I am unable to subscribe to their views, and I respectfully dissent.

/s/ Edward M. McEntee
EDWARD M. MCENTEE
Circuit Judge

Rico is the beneficiary of certain quite favorable legislative provisions. *See, e.g.*, 26 U.S.C. §§ 933, 7653. *See also* Hector, Puerto Rico: Colony or Commonwealth?, 6 N.Y.U.J.Int'l L.&Pol. 115, 135 & nn. 110 & 112 (1973).

[3] *See also Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 254-55 & nn.7-8 (1974); *United States* v. *Guest*, 383 U.S. 745 (1966). *See generally* comment, A Strict Scrutiny of the Right to Travel, 22 U.C.L.A. LRev. 1129 (1975).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 75-1331

CESAR GAUTIER TORRES on behalf of himself and all others similarly situated, PLAINTIFF

v.

DAVID MATTHEWS, Secretary of Health, Education and Welfare, DEFENDANT

JUDGMENT

This action having come for a final hearing before a three judge court, Judges Torruella, Toledo and McEntee sitting, and the issues having been duly rendered, the Court by majority opinion (Hon. Edward McEntee dissenting) hereby

ORDERS, ADJUDGES and DECREES that 42 U.S.C. § 1611(f) and 1614(e) are unconstitutional as applied to plaintiff.

SO ORDERED.

San Juan, Puerto Rico, this 16th day of February 1977.

DENNIS A. SIMONPIETRI
Clerk
U.S. District Court for P.R.

/s/ Ramon A. Alfaro
By: RAMON A. ALFARO
Chief Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 75-1331

CESAR GAUTIER TORRES, PLAINTIFF

v.

DAVID MATTHEWS, Secretary of Health, Education and Welfare, DEFENDANT

NOTICE OF APPEAL

Notice is hereby given that the defendant in the above captioned case appeals to the Supreme Court of the United States, pursuant to 28 United States Code, Sections 1252, 1253 and 2101, from the judgment of the Three Judge Court entered on February 16, 1977.

San Juan, Puerto Rico, March 16, 1977.

/s/ Julio Morales Sanchez
JULIO MORALES SANCHEZ
United States Attorney

/s/ Jose Acosta Grubb
JOSE ACOSTA GRUBB
Assistant U. S. Attorney

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